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No. 83-1123

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHRISTINE VAN WEY, - - - - Petitioner

versus

RAYMOND F. O'NEAL
DONNA O'NEAL and
BABY BOY VAN WEY, - - - - Respondents

BRIEF FOR THE RESPONDENTS, RAYMOND F. O'NEAL AND DONNA O'NEAL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

IRENE P. LONG*
Route #2
Bedford, Kentucky 40006
Telephone: (502) 255-4444

STEPHEN P. SMITH, JR.
2615 Taylorsville Road
Louisville, Kentucky 40205
Telephone: (502) 451-3713
Counsel for Respondents O'Neal
**Counsel of Record*

February 2, 1984

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3281, LOUISVILLE, KY.

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IN THE

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October Term, 1983

No. 81-1123

CHRISTINE VAN WEY, - - - - *Petitioner*

v.

RAYMOND F. O'NEAL
DONNA O'NEAL and
BABY BOY VAN WEY, - - - *Respondents*

BRIEF FOR THE RESPONDENTS, RAYMOND F. O'NEAL AND DONNA O'NEAL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner (Christine Van Wey) contacted a Louisville attorney, one Katie Brophy, in November, 1980, seeking placement for adoption of her unborn child. (Mrs. Van Wey was married, but separated from her husband and the child was that of another man.) The Respondents O'Neal agreed to adopt the baby after its birth. Petitioner in conformity with her wish to "adopt out" her child came to Louisville where she lived for two months awaiting birth of her child. During this period she complied with all state agency procedures preliminary to adoption and once hospitalized for his birth, she executed all necessary releases so that the adoption might go forward. Shortly after the birth of her child on January 22, 1981, he was, with the approval of the Petitioner, delivered to the home of the

O'Neals (Respondents) where he has resided since that date.[1]

After the child was removed from the hospital, and for a part of a day only, Petitioner apparently had a change of mind about the adoption but by that same night she again wanted to proceed with the termination and telephoned her attorney to insist on going ahead with the voluntary termination proceeding the next day. The next day she came before the trial judge and at a hearing on her verified Petition for Voluntary Termination of her Parental Rights (App. A, pp. 1a-4a) demanded that her parental rights be terminated, advising the trial judge that she was fully aware of her action in the termination proceeding. No order was entered since the husband was a necessary party and had to be brought before the Court on constructive service. Petitioner then returned to Iowa.

Not until three months thereafter did Petitioner institute any legal proceedings to retrieve her child from Respondents O'Neal when she filed a Petition for Immediate Entitlement in the Voluntary Termination proceeding which was still pending. (App. B, pp. 5a-7a). Some two months later, after such filing, an evidentiary hearing was had on the second Petition.[2]

---

[1]The child was adopted by Respondents O'Neal in October, 1981, in the appropriate Kentucky forum, the Trimble County Circuit Court. This action has never been questioned.

[2]While the Trial Court initially announced that the matter was for immediate entitlement only, Kentucky law provides, inter alia, that the Court may determine permanent custody in such a proceeding. *Galloway* v. *Pruitt*, Ky., 469 S. W. 2d 556 (1971); *Moore* v. *Dawson*, Ky., 531 S. W. 2d 259 (1975).

At the conclusion of the evidentiary hearing, the Court took the Petition for Immediate Entitlement under submission. Several days thereafter, on June 22, 1981, the Trial Judge entered an Order that Petitioner had taken all the necessary steps to complete the termination of her parental rights and such steps were not the result of threats or duress and her Petition for Immediate Entitlement was denied. (Petition for Certiorari, Appendix N, pages 41a-51a). On July 8, 1981, all parties then being before the Court, the Trial Court entered a Supplemental Order Terminating the Parental Rights on Petitioner's Voluntary Petition pursuant to Kentucky Revised Statutes 199.611 (App. C, p. 8a) and awarded permanent custody to the Respondents O'Neal.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED AS THE SUPREME COURT DOES NOT HAVE JURISDICTION OF THIS CASE.

A. No Federal Questions Were Properly Raised or Considered in the State Courts.

The Petitioner has attempted to invoke jurisdiction under Title 28 U.S.C. Sect. 1257(3). This Court may not take jurisdiction on the ground that the Kentucky Supreme Court did not pass on any federal question and that such question was not in fact raised.

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question *was presented for decision* to the highest court of the state having

> jurisdiction but that its decision of the federal question was necessary to the determination of the cause and that *it was actually decided* or that the judgment so rendered could not have been given without dealing with it." (cites omitted) *Lynch* v. *N. Y., ex rel. Pierson,* 293 U. S. 54, 55, 79 L. Ed. 192, 193 (1934). (Emphasis added)

Title 28 U.S.C. Sect. 1257 (28 U.S.C.S. Sect. 1257) provides in pertinent part as follows:

> "Final judgments or decrees rendered by the *highest court* of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is *specially set up or claimed under the Constitution;* treaties or statutes of, or commission held or authority exercised under, the United States." (Emphasis added).

As applied to this case that statute requires that in the state courts the Petitioner shall have "specially set up or claimed under the Constitution of the United States". Similarly, the Supreme Court Rule 21.1(h) puts the following burden on Petitioner, namely, to:

> ". . . specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . . (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that

> the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

An examination of the portions of the record or summaries set out in the Petition and this Brief in Opposition will show that:

1. No federal question was ever properly raised either in the court of first instance or in the appellate courts, and;

2. No court, either in the court of first instance, or the appellate courts, ever considered or passed upon a federal question in this case.

We would point out that nowhere in the opinion of the Kentucky Supreme Court is any federal question mentioned, let alone expressly passed upon. (App. A, pp. 1a-13a, Petition for Certiorari) Nor is any federal issue mentioned in the dissenting opinion of that Court. The herein Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this Court *can affirmatively show the contrary*". *Street* v. *N. Y.*, 394 U. S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) quoted in *Webb* v. *Webb*, 451 U. S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981). (Emphasis added).

Although Petitioner has cited certain portions of the record in support of her claim that she raised a federal issue, an examination of these references will

show conclusively that Petitioner indeed failed to properly raise or to preserve any constitutional claim.

1. PETITIONER DID NOT PROPERLY RAISE ANY CONSTITUTIONAL QUESTION IN THE TRIAL COURT.

In order to give this Court jurisdiction, it must have been specially set up or claimed at a *proper time and in the proper way.*

> "If it was not claimed in the trial court and therefore by the law and practice of the State, as declared by its highest court, could not be considered by that court; . . . it cannot be asserted in this Court." *Morrison* v. *Watson,* 38 L. Ed. 927 (1894)

Petitioner seeks to invoke the jurisdiction of this Court by language set out from a response to a motion filed in the trial court, to-wit: "Due process mandates a full hearing on the merits before parental rights can be involuntarily terminated" (Petition for Certiorari at page 4). That is the *sole trial court* reference relied on by Petitioner. It does not constitute "specially set up at a proper time and in the proper way". Respondent has set out the entire portion of the record from which the cited phrases were lifted (App. D, pp. 9a-11a). Same shows conclusively that Petitioner was not making any claim to federal protection in the trial court, but that she was relying on the Kentucky statutes to-wit: KRS 199.603. She stated that the trial court should apply one Kentucky statute (KRS 199.603) rather than another (KRS 199.601) (App. T, Petition). The relief demanded by Petitioner was,

"Mrs. Van Wey is absolutely entitled to a hearing pursuant to KRS 199.603." (App. D, p. 11a)[3]

To paraphrase the court in *Webb* v. *Webb, supra,* at page 396, although the Petitioner did use the phrase "due process" at one point in the trial court proceedings, nowhere in that court did she cite to the federal constitution or to any cases relying on the due process clause of the federal constitution. Mere reference to "due process of law" or "Constitution of the United States" is not sufficient to comply with Title 28 U.S.C. 1257(3). *Bowe* v. *Scott,* 233 U. S. 658, 664-665, 34 S. Ct. 49; *Brady* v. *Maryland* 373 U. S. 83, 91; 83 S. Ct. 1194 (1914).

From the portion of the record in the trial court presented to this Court by Petitioner, it is clear that Petitioner was relying on Kentucky statutory remedies. She did not raise any federal question; she did not seek a ruling on a federal question; she did not preserve any claim of error on a constitutional issue in the trial court. Since no constitutional issue was raised in the trial court, that court did not rule on any federal question.

2. PETITIONER DID NOT PROPERLY RAISE ANY CONSTITUTIONAL QUESTION IN THE STATE APPELLATE COURTS.

The question of whether a constitutional issue has been raised in "due time" in the state courts is gen-

[3]Note that Mrs. Van Wey received two (2) hearings in the trial court; one on her Petition for Voluntary Termination held on January 27, 1981; one on her Petition for Immediate Entitlement held on June 17, 1981.

erally left to state procedure. (*Louisville & Nashville R. Co.* v. *Woodford,* 234 U. S. 46, 51, 58 L. Ed. 1202, 34 S. Ct. 739 (1914).)

Not having been claimed in the trial court, by the law and practice in Kentucky as declared by its highest court, such constitutional issue could not be considered by that highest court. In Kentucky, an appeal is limited to claimed errors arising in the trial court and matters not raised in the trial court are not before the appellate tribunals. (Sects. 110-111, Ky. Constitution; *Stice* v. *Leonard,* Ky., 420 S. W. 2d 672, 674 (1967).

> "Since this is an appellate court, our function is to review possible errors made by the trial court. If such court has had no opportunity to rule on a question, there is no alleged error before us to review." *Commonwealth, Dept. of Highways* v. *Williams,* Ky., 317 S. W. 2d 483, 484 (1958).

Thus, no constitutional issue was properly before the Kentucky Court of Appeals or the Kentucky Supreme Court, a federal question having been neither raised nor ruled on in the trial court.

Additionally, Petitioner did not assign as error any constitutional grounds nor rely on any constitutional issues in arguments addressed to the appellate courts. In deciding if a question was specially set up or claimed under the meaning of 28 U.S.C. 1257(3), "It is relevant and usually sufficient to ask whether Petitioner satisfied the state rules governing presentation of issues". (*Amalgamated Food Emp. Union*

v. *Logan Valley Plaza,* dissent of Justice Harlan, 391 U. S. 308, 334, 88 S. Ct. 1601) (citations omitted). In Kentucky practice the Rules of Civil Procedure, namely, Rule 76.12(4)(c)(ii) require that a brief of appellant contain the following:

> "A 'Statement of Points and Authorities' which *shall set forth,* succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to *each issue of law on which he relies for a reversal, . . .*" (Emphasis added) (similar requirement, Appellee, CR 76.12(4)(d)(i).)

Respondent has set out in full the Statement of Points, i.e., the issues of law on which the Petitioner relied in the state appellate courts (App. E-J, pp. 12a-17a). Petitioner did not set out any constitutional issue therein. Despite her statement in the herein Petition, it is clear that Petitioner did not present any Fourteenth Amendment grounds for reversal of the trial court. All told, Petitioner presented six separate sets of issues on appeal in the state courts (App. E-J, pp. 12a-17a), i.e., she had six opportunities to bring a constitutional claim to the attention of the court if she was relying on such claim. Not once did Petitioner frame a constitutional issue for consideration by the appellate court. She did not raise a single federal question at any time. All issues presented are addressed to Kentucky state law. If Petitioner intended to rely on such grounds, she failed to apprise the Court of her intentions!

Petitioner has copied into her Petition herein a paragraph taken from her briefs before the Kentucky Court of Appeals and the Kentucky Supreme Court (Petition for Certiorari, pp. 5-6). Both paragraphs are merely general statements of legal principles. Neither purports to be an issue presented to the Appellate Court for a ruling thereon. This does not constitute "specially set up or claimed" within the meaning of 28 U.S.C. Sect. 1257(3). The Kentucky Supreme Court obviously did not believe that any federal issue was presented to it. It is completely silent on any federal question.

The "specially set up or claimed" limitation under 28 U.S.C. 1257(3) is imposed by Congress on this Court's authority to review judgments of state courts. It is a *jurisdictional limitation. Cardinale* v. *Louisiana,* 394 U. S. 437, 438, 22 L. Ed. 2d 398, 89 S. Ct. 1161 (1969).

It is a long settled rule of this Supreme Court that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (*Webb* v. *Webb, supra*). *People of N.Y., ex rel Bryant* v. *Zimmerman,* 78 L. Ed. 184, 278 U. S. 63, 49 S. Ct. 61 (1928). The jurisdiction of this Court to reexamine the final judgment of the State Court can only arise from averments so distinct and positive so as to place it beyond question that the party bringing a case before this Court from a state court intended to assert a federal right. (*Oxley Stave*

Co. v. *Butler County,* 166 U. S. 648, 655, 41 L. Ed. 1149, 17 S. Ct. 709 (1897). We further submit that Petitioner must show that her grounds for a federal claim were brought to the attention of the state court with *fair precision* and *in due time. People of N.Y. ex rel. Bryant* v. *Zimmerman, supra.* Barring this, her claim has not been adequately presented.

It cannot be said that the record cited to this Court affirmatively discloses that any federal question was raised or considered by the Kentucky Supreme Court. That being so, certiorari should be denied.

3. THE "NOT PRESSED OR PASSED UPON" RULE MANDATES THAT THIS COURT IS WITHOUT JURISDICTION IN THIS CASE

The trial court herein did not address any constitutional issue (App. N, O, Petition for Certiorari). The Kentucky Court of Appeals did not address any constituional issue (App. R, Petition for Certiorari). The Supreme Court of Kentucky did not address any constitutional issue (App. A, B, Petition for Certiorari).

It should be abundantly clear that such omission was not an *oversight* but rather that no federal issue was ever properly brought before any of these courts, and that certiorari must then be denied.

This court has very recently reaffirmed the practee of this Court in the "not pressed nor passed upon" rule with a discussion in *Illinois* v. *Gates,* 103 S. Ct. 2317, 2321, 2323 (1983). Justice Rehnquist in the

opinion quotes from a number of cases holding this said rule to be jurisdictional, to-wit: unless a federal question had been *both raised and decided* in the state court, the appellate jurisdiction fails (*Crowell* v. *Randall,* 10 Pet. 368, 391, 9 L. Ed. 458 (1836). *McGoldrich* v. *Compagnie General,* 309 U. S. 430, 435-436, 60 S. Ct. 670, 673, 84 L. Ed. 849 (1940) states as follows:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant *not pressed or passed upon in the courts below.*" (cites omitted) (Emphasis added)

"Since the (state) Supreme Court did not pass on the question, we may not do so." *State Farm Mutual Automobile Insurance Company* v. *Duel,* 324 U. S. 154, 160, 56 S. Ct. 573, 576, 89 L. Ed. 812 (1945). The court in *Gates* identifies the several purposes underlying the "not pressed or passed upon" rule which have been expressed in prior decisions in refusing to hear federal claims not raised in state courts (*Cardinale* v. *Louisiana, McGoldrich* v. *Compagnie General, supra*) which rationale provides sound justification in the herein case for denial of jurisdiction.

The federal question set out herein by Petitioner for consideration by this Court having never been raised, preserved or passed upon in the state courts below, jurisdiction must be denied.

4. PETITIONER MAY NOT ASSAIL A STATE STATUTE AS UNCONSTITUTIONAL WHERE STATUTE WAS NOT ATTACKED IN STATE COURTS.

Although not directly posed as such, Question II presented by Petitioner puts in issue the constitutionality of Kentucky's statute on *voluntary* termination (KRS 199.601) (Petition for Certiorari, face page i). In asking the question whether the federal right to family privacy and integrity precludes termination of parental rights based upon best interests of the child without a showing of parental unfitness, Petitioner in effect attacks the Kentucky statute as repugnant to the Constitution. Petitioner does not confine her said question to whether her rights may be subject to involuntary termination under such conditions but rather uses the inclusive language "termination of parental rights". Kentucky's statute on voluntary termination cited in Appendix T, Petition for Writ of Certiorari page 71a, 72a, allows for termination of a parent's rights to his child on petition *filed by the parent wherein* "best interest of the child shall be considered paramount". The voluntary termination statute does not require any finding of fitness for a *voluntary* termination.

As in *Morrison* v. *Watson,* 38 L. Ed. 927, 928, 154 U. S. 111 (1894) the difficulty is that it does not appear that any objection to the constitutionality of the statute was taken by Petitioner in courts of the state. On the contrary, she seemed to have assumed that the statute was constitutional and valid. There was no question as to validity of either termination statute. The ques-

tion was whether the court properly proceeded under the voluntary rather than the involuntary termination statute. Such is not the question posed in Petitioner's Question II which in effect assails the constitutionality of Kentucky's termination procedure.

This Court is clearly without jurisdiction to consider the issue raised as Petitioner's Question II. It has been a long standing policy of this Court in cases coming to the Supreme Court from the state courts wherein a statute is assailed as unconstitutional, that there are compelling reasons why this Court should *not* decide questions not presented nor decided by the highest court.

> "Apart from the reluctance with which every court should proceed to set aside *legislation as unconstitutional on grounds not properly presented,* due regard for the appropriate relationship of this Court to state courts *requires* us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. *(McGoldrich* v. *Campagnie General, supra)*

We would also note that Petitioner has not used correct procedures to question the said statute before this Court (U. S. Supreme Court Rule 28).

Petitioner has attempted to do herein by indirection what she may not do directly. The question of the validity of the statute having never been before the state court, the attack in this Court comes too late.

B. The United States Supreme Court Is Without Jurisdiction to Review a State Court Decision Based Upon Adequate and Independent Non-federal or State Ground.

We have already shown that no federal question was properly raised or presented or decided by any of the Kentucky Courts. We now turn our attention to the jurisdiction of the Federal Supreme Court to review State Court decisions where no federal question is involved.

No decision of any federal question was necessary to the determination of the cause; the judgment as rendered, not only could have been, but was given without deciding any federal question.

Despite Petitioner's allegations herein of a federal issue, her cause in the Kentucky Courts was based solely on state grounds. We refer particularly to Kentucky Revised Statute 199.601 and 199.603, the Kentucky statutes on voluntary and involuntary termination of parental rights. The questions presented for argument in the appellate courts of Kentucky were basically:

> (1) Whether the court correctly held that there was no duress when Petitioner consented to the termination of her parental rights.
>
> (2) Whether the Petitioner made, or could make, a timely revocation of her voluntary termination of her parental rights.

The Kentucky Supreme Court obviously understood this case to concern the application of Kentucky law to a question of whether or not she had an *absolute*

right to withdraw her consent to the voluntary termination of her parental rights. The Kentucky Courts have held in a long line of Kentucky cases beginning with *Lee* v. *Thomas,* 297 Ky. 858, 191 S. W. 2d 457 that having voluntarily relinquished custody of her child to others for adoption that Petitioner had no *absolute* right to regain her child. This principle of law has been affirmed time and again by the Kentucky Courts. It places the burden on the one who chooses of his own free will to give up his child that he must prove that the child's best interest would be served by a return of his custody.

Petitioner agreed that she must show sufficient cause to withdraw a consent; however, the Kentucky Supreme Court failed to find sufficient cause herein, stating:

> "When Ms. Van Wey filed her Petition for *Voluntary Termination,* she invoked the jurisdiction of the Court of Justice to look after the welfare of this human being" (the infant child). (Petitioner's Appendix A, Petition for Certiorari, pages 1a-13a, at 13a) (Emphasis added)

That court then proceeded under the voluntary termination statute contrary to Petitioner's claim that the Court must apply the involuntary termination statute. All issues were questions of state law. No federal question was involved.

Since it has clearly been shown that the state court decision was based upon a non-federal ground, it only becomes necessary to discover whether that ground is

adequate to support the judgment without consideration of the federal question which was never properly brought before any of the courts of Kentucky.

The Federal Supreme Court has consistently adhered to the self-imposed principle that it will not review a State Court judgment based upon an adequate and independent state ground. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U. S. 53; *Fox Film Corp.* v. *Muller,* 296 U. S. 207.

In the case of *Zacchini* v. *Scripts-Howard Broadcasting Co.,* 53 L. Ed. 2d 965, 970 *et seq.,* the Supreme Court said:

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's Inc.,* 355 U. S. 597, 2 L. Ed. 2d 519, 78 S. Ct. 526 (1958) for '(o)ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views on federal laws, our review could amount to nothing more than an advisory opinion.'" *Herb* v. *Pitcairn,* 324 U. S. 117, 125-126, 89 L. Ed. 789, 65 S. Ct. 459 (1945).

Since we have shown that there is no federal constitutional issue properly before this Court it only remains to determine if the non-federal ground is broad enough to sustain the state judgment, is inde-

pendent of any federal question and the grounds used are tenable ones. *Abie State Bank* v. *Bryan,* 282 U. S. 765, 773; *Staub* v. *Baxley,* 355 U. S. 313, 318-319; *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 455.

Petitioner cites in her petition Kentucky Revised Statute 199.601 and Kentucky Revised Statute 199.603 (Petitioner's Appendix T, pages 71a-76a). From its very inception in the Trial Court this action has *only* involved the construction of these statutes as applied to the facts of this case. It was never in the contemplation of any of the parties or the courts that there was any other issue other than those rights grounded in state law subject to the application of the Kentucky Revised Statutes 199.601 and 199.603.

Thus we find that the non-federal ground (the construction and application of these State Statutes) is broad enough to sustain the State Judgment, *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Eustis* v. *Bolles,* 150 U. S. 361, 370; that it is independent of any federal question (none was raised or preserved below as has been previously shown); and, the non-federal ground is a tenable one (the reasoning of the Kentucky Supreme Court is clear and unambiguous as to its basis of its decision). There is no indication that the Kentucky Supreme Court decision is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question". *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 164; *Ward* v. *Love County,* 253 U. S. 17, 22;

Postal Tele. Cable Co. v. *Newport,* 247 U. S. 464, 475-476; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282.

These inquiries all being answered in the affirmative the Supreme Court should decline jurisdiction.

II. THE KENTUCKY SUPREME COURT DECISION IS A LEGITIMATE CONSTRUCTION AND APPLICATION OF STATE STATUTES REGARDING VOLUNTARY AND INVOLUNTARY TERMINATION OF PARENTAL RIGHTS.

It must be remembered that this action was brought as a voluntary termination by the natural mother under KRS 199.601 (Petitioner's Appendix T, pages 71a-73a). There the procedure for and the right of a parent to terminate his parental rights is set up. *This is an action which can be brought only by a parent* and even so there are safeguards established to protect the Due Process rights of the parent.

The cases cited by the Petitioner are those that have involved the involuntary termination of parental rights. The case of *Santosky* v. *Kramer,* 455 U. S. 245, 102 S. Ct. 1388 (1982) was an action brought by the State of New York to involuntarily terminate the rights of the parents. This court struck down the State Statute as the stated standard of proof was not high enough. In that case the constitutionality of the statute was challenged at every step in the State Court proceedings. Such was not the case in the action now pending before this Court.

The case of *Lassister* v. *Dept. of Social Services of Durham, North Carolina,* 452 U. S. 18, 101 S. Ct. 1253 (1981) was again an involuntary termination action brought by an agency of the State of North Carolina and appealed on the ground that counsel had not been appointed for the indigent mother. The Supreme Court found that her Due Process rights had not been violated and affirmed the State Court judgment terminating her parental rights. Chief Justice Burger, in his concurring opinion, said:

> "The purpose of the (involuntary) termination proceedings at issue here was not punitive; on the contrary, its purpose was *protective* of the child's best interest. * * * (T)he writ might well have been a 'candidate' for dismissal as improvidently granted." ( ) inserted.

The only discussion of *Matthew* v. *Eldridge,* 424 U. S. 319, 96 S. Ct. 893 (1976) came in the deciding whether the mother was entitled to appointed counsel to represent her.

None of the other Supreme Court cases cited by Petitioner have any relationship to termination proceedings.

The decision of the Kentucky Supreme Court was based solely upon the application of the Kentucky Termination Statutes to the facts presented in the Trial Court. The Kentucky Court found that the provisions of the voluntary termination statute had been met by the evidence.

III. THE USE OF A "BEST INTEREST" STANDARD TO TERMINATE PARENTAL RIGHTS IN A VOLUNTARY TERMINATION PROCEEDING DOES NOT REQUIRE A FINDING OF UNFITNESS.

The Supreme Court of Kentucky correctly applied the State law relative to voluntary terminations. KRS 199.601. This Kentucky Statute provides, in part, that

> 7. The best interest of the child shall be considered paramount.

Under this statute it is not necessary to find unfitness on the part of a parent who voluntarily terminates his parental rights.

It cannot be said that the decision of the trial court was not reached after the Petitioner had been afforded a full hearing and the opportunity to offer evidence on any matter she thought relevant, and the Petitioner's substantive rights were not violated by a "best interest of the child" standard.

This is not a case in which the child would be placed with a new set of parents with whom the child had never before lived but is a case that gives full recognition to a family unit that has been in existence since the birth of the child (some three years ago), a result desired by all concerned, except Petitioner. Thus it is clearly evident that the decision of the Kentucky Supreme Court was not based on the "best interest of the child" standard alone. *Quillion* v. *Walcott*, 434 U. S. 246, 98 S. Ct. 549 (1978). In both of the Kentucky termination statutes the "best interest of the child' is only one of the factors to be considered. All

relevant factors were considered by the Kentucky Supreme Court and it cannot be said that its decision was based on the "best interest of the child" alone.

CONCLUSION

For all the reasons hereinabove recited, it is clear that the United States Supreme Court does not have jurisdiction of the herein case and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

IRENE P. LONG
Route #2
Bedford, Kentucky 40006
Telephone: (502) 255-4444

STEPHEN P. SMITH, JR.
2615 Taylorsville Road
Louisville, Kentucky 40205
Telephone: (502) 451-3713

Counsel for Respondents O'Neal

PROOF OF SERVICE

I, Irene P. Long, the counsel of record for Respondents having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of the Brief in Opposition in the above-styled case were mailed, first class postage prepaid, to Ellen G. Friedman, Counsel for Petitioner, Legal Aid Society, Inc., 425 West Muhammad Ali Blvd., Louisville, Kentucky 40202; Robert Frederick Smith, Counsel for Petitioner, Legal Aid Society, Inc., 425 West Muhammad Ali Blvd., Louisville, Kentucky 40202; and Charles Dobbins, Jr., Counsel for Baby Boy Van Wey, 600 West Main Street, Louisville, Kentucky 40202, all on the 2nd day of February, 1984. I further certify that to my knowledge all parties required to be served have been served.

Irene P. Long

IRENE P. LONG
Counsel for Respondents
Route #2
Bedford, Kentucky 40006
Telephone: (502) 255-4444

APPENDIX

APPENDIX A

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - - *Petitioner*

v.

STANLEY VAN WEY
WARNING ORDER AND MILITARY ATTORNEY
TO BE APPOINTED
BABY BOY VAN WEY, an infant under
14 years of age
GUARDIAN AD LITEM TO BE APPOINTED
(Serve: Guardian ad Litem) - - *Defendants*

PETITION FOR VOLUNTARY TERMINATION OF PARENTAL RIGHTS PETITION FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS AND AFFIDAVIT FOR APPOINTMENT OF WARNING ORDER AND MILITARY ATTORNEY

1. The Petitioner, CHRISTINE VAN WEY, states that she is the natural mother of a child, BABY BOY VAN WEY, born January 22, 1981.

2. The Petitioner, CHRISTINE VAN WEY, states that she is willing to relinquish all of her parental rights in and to the child, BABY BOY VAN WEY, to the couple approved by the Department for Human Resources.

3. The Petitioner, CHRISTINE VAN WEY, is authorized under KRS 199.601 to institute this action.

4. The Petitioner, CHRISTINE VAN WEY, states that the infant Defendant, BABY BOY VAN WEY, was born January 22, 1981, in Louisville, Jefferson County, Kentucky.

5. The Petitioner, CHRISTINE VAN WEY, states that she was married at the time of the birth of the infant Defendant to Stanley Van Wey. Petitioner states that Stanley Van Wey is not the natural father of the infant Defendant and that the natural father of the infant Defendant is unknown. However, due to the marital relationship Stanley Van Wey is made a party to this action so that any parental rights he may have to the infant Defendant may be terminated.

6. The Petitioner, CHRISTINE VAN WEY, states that the Defendant Stanley Van Wey has never acknowledged the infant Defendant and therefore has abandoned and deserted same.

7. The Petitioner, CHRISTINE VAN WEY, states that it will be in the best interest of the infant Defendant, BABY BOY VAN WEY, to have the parental rights of the Defendant, Stanley Van Wey, terminated, and to have the care, custody and control of the infant Defendant, BABY BOY VAN WEY, placed in the home approved by the Department for Human Resources.

8. The Petitioner, CHRISTINE VAN WEY, states that the couple approved by the Department for Human Resouces, Commonwealth of Kentucky, has adequate facilities available and is willing to accept the care, custody and control of the infant Defendant, BABY BOY VAN WEY.

9. The Petitioner, CHRISTINE VAN WEY, states that the infant Defendant, BABY BOY VAN WEY, has no guardian, curator or committee appointed for him in this state or elsewhere.

10. The Petitioner, CHRISTINE VAN WEY, states that the Defendant Stanley Van Wey, is a nonresident of Kentucky and is known to be absent therefrom and his last known address is 128 Sheridan, Muscatine, Iowa 52761.

WHEREFORE: The Petitioner, CHRISTINE VAN WEY, prays:

1. That a guardian ad litem be appointed to accept service of summons for the infant Defendant, BABY BOY VAN WEY, and to represent him when he is properly before the Court.

2. That a Warning Order and Military Attorney be appointed to attempt to locate the Defendant, Stanley Van Wey, for the purpose of informing him of the nature and pendency of this action;

3. For a judgment terminating the parental rights of CHRISTINE VAN WEY to the infant Defendant, BABY BOY VAN WEY.

4. For a judgment terminating all of the parental rights of the Defendant, Stanley Van Wey, to the infant Defendant, BABY BOY VAN WEY, and that the care, custody and control of the said infant be granted to and vested in the couple approved by the Department for Human Resources, Commonwealth of Kentucky.

5. For any and all other relief to which the Petitioner, and the infant Defendant, BABY BOY VAN WEY, may appear entitled.

(s) Christine Van Wey
Christine Van Wey

I, CHRISTINE VAN WEY, hereby certify that I have read the foregoing petition and that all allegations contained therein are true to the best of my knowledge and belief.

(s) Christine Van Wey
Christine Van Wey

(s) Katie M. Brophy
Katie M. Brophy
Attorney at Law
Suite 200
123 South Seventh Street
Louisville, Kentucky 40202
Phone: (502) 583-1711

I, the undersigned Clerk of Jefferson Circuit Court do certify that the foregoing Petition for Voluntary Termination of Parental Rights, Petition for Involuntary Termination of Parental Rights and Affidavit for Appointment of Warning Order and Military Attorney was this day acknowledged before me in said State and County and was delivered, sworn, acknowledged and signed by the Petitioner, CHRISTINE VAN WEY, to be her free and voluntary act and deed for the purposes therein contained.

Paulie Miller, Clerk
Jefferson Circuit Court

By: Marfa Jones
Deputy Clerk

Jan. 27, 1981
Date

APPENDIX B

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - - *Petitioner*
503 Park Avenue
Muscatine, Iowa 52761

v.

STANLEY VAN WEY,
BABY BOY VAN WEY - - - - - - *Defendants*

PETITION FOR IMMEDIATE ENTITLEMENT POSSESSION AND CUSTODY—Filed April 30, 1981

Comes the Petitioner, Christine Van Wey, by counsel, and for her petition for immediate entitlement, possession and custody states as follows:

1. Petitioner is the natural mother of infant child Baby Boy Van Wey, born on January 22, 1981.

2. Petitioner was legally married to Respondent, Stanley Van Wey, at the date of birth of said child.

3. John W. Adler is the natural father of said infant child.

4. The Court record of the above-styled case contains no order terminating the rights of any of the persons named in paragraphs one, two and three above.

5. On January 27, 1981, Petitioner signed a petition to voluntarily terminate her parental rights to said infant child.

6. That petition was signed under extreme duress at a time when Petitioner was emotially upset, physically weakened, and financially destitute, miles from her home; Petitioner was also in fear for the well-being of her other two children. (See Petitioner's Affidavit attached herein as Exhibit 1.)

7. Due to severe financial hardship and emotional strain, before the baby was born, Petitioner hired Katie Marie Brophie, attorney at law, to represent her in terminating her parental rights.

8. Immediately after Ms. Brophie removed the baby from the hospital, Petitioner realized she did not want to give up her child.

9. Petitioner attempted to get the baby back by contacting the Department for Human Resources, the Louisville Bar Association, and the Legal Aid Society, Inc., for help.

10. Petitioner told Ms. Brophie that she no longer wished to terminate her rights, and that she had a new attorney to represent her, but nevertheless, Ms. Brophie coerced Petitioner to sign the voluntary termination papers. (See Exhibit 1, paragraph 3.)

11. Petitioner would not have signed the petition for voluntary termination but for undue pressure placed upon her at a time when she was emotionally upset, physically weakened, and financially destitute, miles from her home.

12. Petitioner is presently physically, emotionally and financially able to care for her baby, and she is the fit and proper person to have possession and custody of said child.

13. Although Petitioner did not freely give consent to terminate her parental rights, she hereby revokes said "consent", such as it was.

WHEREFORE, Petitioner prays this Court grant her immediate entitlement, possession and custody of infant child, Baby Boy Van Wey.

Tendered By:

(s) Ellen G. Friedman
Ellen G. Friedman
Attorney for Petitioner

(s) Robert Frederick Smith
Robert Frederick Smith
Attorney for Petitioner
Legal Aid Society, Inc.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254

CERTIFICATE

I hereby certify that a copy of the foregoing Petition was on the 29th day of April, 1981, mailed to Mr. Charles Dobbins, Attorney at Law, 2310 First National Tower, Louisville, Kentucky 40202, and Mr. and Mrs. Raymond O'Neal (a/k/a Donna & Frank O'Neal), Route #2, Bedford, Kentucky 40006.

(s) Ellen G. Friedman
Ellen G. Friedman
Attorney at Law

APPENDIX C

KENTUCKY REVISED STATUTES

199.611. Order of termination. [Repealed effective July 15, 1984.]—(1) If the court determines that all parties with parental rights to the child under the law have either petitioned the court to have their parental rights terminated voluntarily or have had their rights terminated involuntarily by an order entered by a court of competent jurisdiction, and that the termination of parental rights and their transfer are in the best interest of the child, and that each petitioner is fully aware of the purpose of the proceedings and the consequences of KRS 199.601 to 199.617, it shall make an order terminating all parental rights and obligations in the parent in whom they have existed, and releasing the child from all legal obligations to his parents, and transferring such parental rights to some other person or authorized agency or department as may, in the opinion of the court, be best qualified to receive them, except that the child shall retain the right to inherit from its parents under the laws of descent and distribution until the child is adopted. Such order may contain the power for the cabinet, or authorized agency to consent to the adoption of such child.

(2) Any order entered under KRS 199.601 to 199.617 shall be conclusive and binding on all parties and no appeal may be taken from a judgment of voluntary termination. (Enact. Acts 1978, ch. 137, § 9, effective June 17, 1978.)

Compiler's Notes. This section was repealed by § 152 of Acts 1980, ch. 280, effective July 1, 1982; however § 1 of Acts 1982, ch. 284 amended § 153 of Acts 1980, ch. 280 changing the effective date of such act to July 15, 1984. Therefore, the repeal of this section is effective July 15, 1984.

APPENDIX D

JEFFERSON CIRCUIT COURT

SIXTH DIVISION

No. 81-AD-0037-T

CHRISTINE VAN WEY - - - - - *Petitioner*

v.

STANLEY VAN WEY, ET AL. - - - *Defendants*

PETITIONER'S RESPONSE TO DEFENDANTS' MOTION TO TERMINATE HER RIGHTS

I. Defendants, Frank and Donna O'Neal, Have No Standing to Move for Termination of Petitioner's Parental Rights.

The Kentucky legislature specifically provided a list of those who have standing to bring such an action. They are "the department, any child-placing agency licensed by the department, any probation officer, any state or local law enforcement officer, any county or commonwealth's attorney or parent." KRS 199.603(7). Clearly, the O'Neals do not fall within any of these specified categories, and the law does not permit anyone else to act.

In *Smith* v. *Wilson*, Ky., 269 S. W. 2d 255 (1954), the Court of Appeals held that policy considerations mandated the interpretation that only those listed by the statute could bring such an action. In that case, as here, the couple wanting to adopt a child in their possession attempted to terminate the natural mother's rights. The court found that they were prohibited from doing so.

> When the extreme character of the present action is considered—interference with or severance of the natural rights of a parent and making the child the ward of the State—we think that in providing that the action "may be instituted" the legislative intent was to vest exclusive discretionary power in the designated public officers. *Id.* at 257.

The established law in Kentucky, based upon sound policy considerations, precludes this court from terminating the parental rights of Christine Van Wey at the request of the O'Neals.

II. Petitioner's Parental Rights Cannot be Terminated Without a Full Hearing on the Merits.

Even if this court were to proceed on the Defendants' motion, the proceeding, in reality, would be a petition to *involuntarily* terminate her rights. Soon after signing the petition to voluntarily terminate her rights, Christine Van Wey revoked her consent. No order of termination was ever entered. It is abundantly clear that, if ever Christine Van Wey consented to have her rights terminated, at this point in time she is fighting desperately for her son. It would be a mockery to pretend otherwise. This court cannot now in good conscience terminate Ms. Van Wey's rights as if this were a "voluntary" proceeding.

If this court proceeds at all, it must treat the matter as an involuntary termination and provide Ms. Van Wey with all the rights and protections to which she is entitled by state and federal law. Specifically, KRS 199.603 requires pleading and proof by a preponderance of evidence that abandonment or substantial or continuous or repeated neglect or abuse has occurred. In addition, there are numerous mitigating factors that the court must consider before reaching its decision. Due process mandates a full

hearing on the merits before parental rights can be involuntarily terminated.

All proceedings thus far have been limited to the issue of immediate entitlement. There have been no pleadings filed or evidence presented going to the issue of whether Ms. Van Wey's parental rights should be terminated. In fact, to the contrary, the only evidence presented at trial as to her fitness as a parent were highly favorable reports from Iowa social services. Ms. Van Wey has an absolute right to defend any action brought to terminate her rights.

CONCLUSION

Defendants' motion to terminate the parental rights of Christine Van Wey should be overruled. Frank and Donna O'Neal do not have standing to make such a request. Further, even if this court should find that such a motion is valid, Ms. Van Wey is absolutely entitled to a hearing pursuant to KRS 199.603.

Respectfully submitted,

LEGAL AID SOCIETY, INC.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254

By: _____
ELLEN G. FRIEDMAN

By: _____
ROBERT FREDERICK SMITH

APPENDIX E

PETITIONER'S BRIEF IN THE KENTUCKY COURT OF APPEALS

INTRODUCTION

This is an appeal from the denial of appellant's petition for immediate entitlement to the possession and custody of her son, the award of permanent custody to appellees and the termination of appellant's parental rights.

STATEMENT OF POINTS AND AUTHORITIES

I. The Trial Court's conclusion that the appellant was not acting under duress when consenting to the termination of her parental rights was clearly erroneous. Authorities. (Omitted)

II. The Trial Court erred in refusing to find that appellant made a timely revocation of her consent to terminate her parental rights.

III. The Trial Court erred in applying the best interest standard and its finding that it is in the best interest to stay with the appellees is clearly erroneous.

IV. It was an abuse of discretion for the Trial Court to award permanent custody to appellees.

V. It was an abuse of discretion for the Trial Court to terminate appellant's parental rights.

APPENDIX F

PETITIONER'S REPLY BRIEF IN THE KENTUCKY COURT OF APPEALS

STATEMENT OF POINTS AND AUTHORITIES

Arguments:

I. A finding of duress or undue influence is a subjective test and appellant herein was under duress and undue influence when she signed a petition to terminate her rights.

II. A petition to voluntarily terminate parental rights is the legal equivalent of a consent to adopt.

III. A consent to voluntarily terminate rights can be revoked before a final order for sufficient cause.

IV. The Court limited the proceedings to the issue of immediate entitlement and consequently erred in applying the wrong standard, and in awarding permanent custody and terminating appellant's parental rights.

V. The Court was not compelled by KRS 199.611 to sign an order of termination.

APPENDIX G

PETITIONER'S BRIEF IN KENTUCKY COURT OF APPEALS—APPELLANT'S RESPONSE TO APPELLEES O'NEALS' PETITION FOR REHEARING

STATEMENT OF POINTS AND AUTHORITIES

Authorities: (Omitted)

I. The Court of Appeals did not overlook any material fact in the record.

II. The Court of Appeals was correct in concluding that Christine Van Wey signed the petition to terminate her parental rights under duress and undue influence.

III. The Court of Appeals has a complete and accurate understanding of the applicable case law presented.

IV. The Court of Appeals complied with CR 52.01.

APPENDIX H

PETITIONER'S BRIEF IN KENTUCKY COURT OF APPEALS—APPELLANT'S RESPONSE TO PETITION FOR REHEARING BY GUARDIAN AD LITEM, APPELLEE

STATEMENT OF POINTS AND AUTHORITIES

Authorities: (Omitted)

I. The Court of Appeals applied the correct legal standard to this case.

II. The Court of Appeals neither misconceived nor overlooked the applicable law on revocation.

APPENDIX I

PETITIONER'S BRIEF IN KENTUCKY SUPREME COURT—RESPONSE TO MOTIONS OF RAYMOND F. O'NEAL AND DONNA O'NEAL AND GUARDIAN AD LITEM FOR DISCRETIONARY REVIEW

Arguments:

I. The Opinion of the Court of Appeals is based upon established law.

II. The cases presented by movants are not on point.

III. The Court of Appeals had jurisdiction to review this case.

IV. The Court of Appeals applied the standards mandated by Kentucky and Federal law.

APPENDIX J

PETITIONER'S BRIEF IN KENTUCKY SUPREME COURT—BRIEF FOR RESPONDENT, CHRISTINE VAN WEY

STATEMENT OF POINTS AND AUTHORITIES

I. The Trial Court's conclusion that the respondent was not acting under duress and undue influence when consenting to the termination of her parental rights is clearly erroneous.

II. Respondent made a timely revocation of her consent to terminate her parental rights and for sufficient cause.

III. Application of a best interest standard without due consideration to the presumption in favor of the natural parent is contrary to State and Federal law.

IV. It was an abuse of discretion for the Trial Court to award permanent custody to movants.

V. It was an abuse of discretion for the Trial Court to terminate respondent's parental rights.

IV. The entry of an order of termination labeled "voluntary" by the Trial Court does not preclude appeal.